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No. 366

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1970

STATE BANK & TRUST COMPANY,
Petitioner,

v.

MARYLAND CASUALTY COMPANY,
Respondent.

RESPONDENT'S BRIEF OPPOSING PETITION FOR WRIT OF CERTIORARI

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RESPONDENT'S BRIEF OPPOSING PETITION FOR WRIT OF CERTIORARI.

May It Please The Court:

In this brief opposing petition for writ of certiorari in the above captioned case petitioner will be referred to as Bank and respondent as Maryland. Unless otherwise stated, all emphasis has been supplied.

REPLY TO BANK'S STATEMENT OF CASE

In large measure Bank's statement of the case partakes of an argumentative analysis of the 5th Circuit's opinion and holdings in this case. Our disagreements therewith (e.g. that the 5th Circuit did *not* hold that Behring did not commit a theft) are incorporated hereinafter in our argument.

In amplification of Bank's statement of the facts of this case and for this court's ready reference, we have

attached as Appendix A to this brief a verbatim extract of pertinent stipulated facts.

ARGUMENT IN OPPOSITION TO GRANTING OF PETITION FOR WRIT OF CERTIORARI

1. BANK REASON NO. 1 (THAT 5TH CIRCUIT HELD THAT BEHRING DID NOT COMMIT A THEFT AND THAT SUCH HOLDING CONFLICTS WITH TEXAS LAW) IS NEITHER CORRECT NOR "SPECIAL AND IMPORTANT" WITHIN MEANING OF SUPREME COURT RULE 19

As its first reason for granting certiorari, Bank contends that the 5th Circuit "has held that Behring did not commit a theft," and that such holding "directly conflicts with the decision of the Texas Court of Criminal Appeals, construing Texas Penal Code, Art. 1413, that theft by false pretext is committed under essentially the same facts.'" This contention is incorrect because the 5th Circuit did not so hold in this case. Moreover, such a holding would not constitute a "special and important" reason within the meaning of this court's Rule 19.

a. *5th Circuit did not hold that Behring did not commit a theft.*

Bank mistakenly reads into two places in the 5th Circuit's opinion a supposed holding "that Behring did not commit a theft."[3] In pertinent context what

[1] Bank's petition, p. 8.

[2] See Appendix B of this brief at pp. B-3, B-4.

[3] Bank's petition, p. 8. See also pp. 2, 5-7.

the 5th Circuit's opinion said in this regard is quoted as Appendix B to this brief.[1]

Thus, in context, when the 5th Circuit wrote that it "was not bound by the conclusionary characterization of 'theft' based upon the borrower's subjective intent that the District Court ascribed to the transaction,"[2] the 5th Circuit meant what it said and no more. The District Court had reasoned that since Melvin Behring intended to steal and not repay the $50,000.00, the basic transaction was a theft to the exclusion of its also being a loan. Saying that this "theft-therefore no loan" finding or conclusion was not binding upon it, the 5th Circuit reasoned that the basic transaction remained a loan within the meaning of the loan-exclusion clause, notwithstanding that Melvin Behring's subjective intent made him guilty of theft by false pretext with respect to the loan proceeds.

Similarly, when the 5th Circuit said that "it appears plain to us that a person subjectively intending to use an objectively bona fide loan transaction as a means of getting money from a bank with no intention of repayment does not *procure* a loan through theft,"[3] the 5th Circuit was not inferentially holding that Behring did not commit a theft. Rather it was rejecting the "ambiguity" and "loan *procured* by theft" argument advanced by Bank[4] on the basis, in substance, of Maryland's following reply thereto:

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[1] See Appendix B of this brief at p. B-3.

[2] Conclusion v. Finding? See Maryland-Appellant's Brief, pp. 9-10.

[3] See Appendix B of this brief at p. B-4.

[4] See Bank-Appellee's Brief, pp. 19-20, 24-28.

"B. Reply to Bank's 'Loan Procured by Theft' Argument

"Reurging a theory that the trial court did not choose to adopt, Bank argues that, even if the October 10, 1966 transaction is a 'loan,' it does not come within the loan-exclusion clause, 'for the reason that the exclusion clause specifies loans procured through other means, but does not specify a loan procured through theft.' The flaw in this argument is that, reasonably construed, the procurement phrase ('whether procured in good faith or through trick, artifice, fraud or false pretenses') is a comprehensive one inclusive of all loans regardless of any criminal conduct vel non in connection therewith. In plain English, a person intending to use a loan transaction as the means of stealing a bank's money does not *procure* the loan 'through theft'; he *procures* the loan 'through trick, artifice, fraud or false pretenses' and becomes guilty of theft with respect to the loan proceeds.'"[1]

b. *Supposed 5th Circuit's holding would not be a "special and important" reason within the meaning of Supreme Court Rule 19.*

In granting a writ of certiorari ". . . this Court does not sit to satisfy a scholarly interest in such issues. Nor does it sit for the benefit of the particular litigants. . . . 'Special and important reasons' imply a reach to a problem beyond the academic or the episodic." *Rice v. Sioux City Mem. Park Cemetery, Inc.*, 349 U.S. 70, 74, 75 S.Ct. 614, 616 (1955). Assuming arguendo that the 5th Circuit's opinion is susceptible of being construed as holding that Behring did not commit a theft, and that such holding conflicts with

[1] Maryland-Appellant's Reply Brief, p. 8; footnotes omitted.

Texas law, we submit that any error in this regard would be episodic at most and would affect only the particular litigants here and not other cases involving different facts and circumstances under the same or different state law.

2. BANK REASON NO. 2 (THAT 5TH CIRCUIT BROADLY CONSTRUED LOAN-EXCLUSION CLAUSE IN INSURER'S FAVOR IN CONFLICT WITH TEXAS LAW) IS NEITHER CORRECT NOR "SPECIAL AND IMPORTANT" WITHIN MEANING OF SUPREME COURT RULE 19

Under its second reason for granting certiorari, Bank urges that the 5th Circuit "broadly construed exclusion clause 1(d)[9] *in favor of*[10] the insurer" in conflict with Texas Supreme Court cases.[11] This is a fallacious analysis in that what the 5th Circuit did was to accept Maryland's position that the loan-exclusion clause is *unambiguous*[12] and to reject Bank's contraposition that it is ambiguous.[13] Absent ambiguity in that clause, the 5th Circuit had no occasion to construe it, and did not construe it, either broadly in favor of or strictly against either party.

In this regard the 5th Circuit's opinion soundly states:

> "The bank next presses its argument that the clause in question is ambiguous. . . .

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[9] Loan-exclusion clause.

[10] Emphasis Bank's.

[11] Bank's petition, p. 12.

[12] Appellant's Brief, pp. 22-23.

[13] Appelle's Brief, pp. 24-25.

> "In Texas whether an ambiguity exists in the language of an exclusionary clause is one of law. If the language is clear and unambiguous, such meaning must be given to the language as will carry out and effectuate the intention of the parties. In that event, rules of construction, such as adopting that construction most favorable to the insured, are not to be applied.' *St. Paul Mercury Insurance Company v. Price*, 5 Cir. 1966, 359 F.2d 74, 76. We find the language here under consideration to be 'clear and unambiguous.' *East Gadsden, supra*;[14] *Community Federal, supra*;[15] *Depositors Trust Co. v. Maryland Casualty Co.*, Me. 1961, 174 A.2d 288,[16]

This part of the 5th Circuit's opinion has two facets, (1) a conclusion that the loan-exclusion clause is *unambiguous*, and (2) a declaration that under Texas law the rule for construction favorable to an insured does not apply to *unambiguous* policy provisions, including exclusions. The 5th Circuit's conclusion that the loan-exclusion clause is *unambiguous*[17] is supported expressly by two of the cited cases, *Community Federal* (8th Circuit)[18] and *Depositors Trust* (Sup. Ct. of Maine)[19] and implicitly by the other, *East Gadsden* (5th Circuit).[20] Indeed, this conclusion does not conflict with any case of which we are aware, and Bank has cited no case by any court holding the loan-exclusion clause to be ambiguous.

Futhermore, the 5th Circuit's declaration that un-

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[14] 415 F.2d 357 (5th Cir. 1969).
[15] 274 F.2d 620, 624 (8th Cir. 1960).
[16] 5th Circuit opinion, pp. 7-8.
[17] 274 F.2d 620, 624.
[18] 174 A.2d 288, 292.
[19] 415 F.2d 357-360.

der Texas law the rule for construction favorable to an insured does not apply to *unambiguous* policy provisions, including exclusions, is squarely and explicitly supported by *Price*, where the 5th Circuit correctly enunciated Texas law to be:

> "If the applicable language, *here that of the exclusionary clauses*, is clear and unambiguous, such meaning must be given to the language as will carry out and effectuate the intention of the parties. In that event, rules of construction, such as adopting that construction most favorable to the insured, are not to be applied. General American Indemnity Company v. Pepper, 1960, 161 Tex. 263, 339 S.W.2d 660."[20]

Neither *Providence Washington Ins. Co. v. Proffitt*, 239 S.W.2d 379 (Tex. 1951) nor *Continental Cas. Co. v. Warren*, 254 S.W.2d 762 (Tex. 1953) cited by Bank[21] is in conflict with either facet of the 5th Circuit's above quoted holding. Both of these cases involve entirely different insurance policy provisions (*Proffitt:* damage to automobile washed off causeway by floodwater as within "collision or upset" coverage clause; *Warren:* injury to pilot as within "passenger" coverage clause); and in both instances the Texas Supreme Court construed the provisions at issue to be ambiguous within the meaning of that term under Texas law, see *Universal C.I.T. Credit Corp. v. Daniel*, 243 S.W.2d 154, 157 (Tex. 1951).

Moreover, we submit that neither facet of the 5th Circuit's above quoted holding can soundly be said to involve "special and important" reasons within the

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[20]359 F.2d 74, 76.

[21]Bank's petition, pp. 12-13.

meaning of Supreme Court Rule 19. To the contrary, both facets are manifestly academic and episodic.

3. BANK REASON NO. 3 (THAT 5TH CIRCUIT'S CONSTRUCTION OF "COUNTERFEITED" FOLLOWS MAJORITY VIEW OF SIX OTHER CIRCUITS AND REJECTS MINORITY VIEW OF TWO CIRCUITS IN CLAIMED CONFLICT WITH TEXAS LAW) IS NOT "SPECIAL AND IMPORTANT" WITHIN MEANING OF SUPREME COURT RULE 19.

For its third reason for granting certiorari, Bank refers this court to the majority[22] v. minority[23] alignment of Courts of Appeals as to the coverage meaning of "counterfeited" in Clause (E).[24] Chronologically this alignment developed as follows:

The first Court of Appeals (3rd Cir.) to pass upon this point committed itself to what is now the minority view, construing a "counterfeited" instrument, within the meaning of Clause (E), to be "something that purports to be something that it is not." *Fidelity Trust Co. v. Am. Sur. Co.*, 268 F.2d 805, 807 (3rd Cir. 1959—Pa. law) (fictitious invoices with genuine signatures).

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[22]2nd, 4th, 5th, 6th, 7th, 8th, and 10th Circuits. See also: *First Nat'l Bank v. St. Paul Fire and Mar. Ins. Co.*, unpublished opinion included as Appendix B of Appellant's Brief (D. Kan. 1965) (fictitious invoices with genuine signatures); *First Nat'l Bank v. Am. Ins. Co.*, 280 F. Supp. 620 (E.D. Mo. 1968) (fictitious bills of lading with false signatures).

[23]3rd and 9th Circuits.

[24]Bank's petition, pp. 13-16. It should be noted that coverage under Clause E is expressly excepted from the loan-exclusion clause.

The next five Courts of Appeals (2d, 4th, 6th, 8th and 10th) to consider the point declined to follow *Fidelity* and developed the majority view that, within the meaning of Clause (E), a "counterfeited" instrument (a) is an imitation, one which attempts to simulate another instrument which is authentic, and/or (b) must be "counterfeited" as to the issuer's signature thereon. *State Bank v. Maryland Cas. Co.*, 289 F. 2d 544 (8th Cir. 1961—Mo. law) (fictitious chattel mortgages with genuine signatures); *First Nat'l Bank v. Glens Falls Ins. Co.*, 304 F.2d 866 (4th Cir. 1962—S.C. law) (unsigned fictitious invoices); *First Nat'l Bank v. Aetna Cas. & Sur. Co.*, 309 F.2d 702 (6th Cir. 1962—Tenn. law) (fraudulent warehouse receipts with genuine signatures), cert. denied, 83 S. Ct. 951 (1963); *North Carolina Nat'l Bank v. U. S. Cas. Co.*, 317 F.2d 304 (4th Cir. 1963—N.C. law) (fictitious invoices with genuine signatures), cert. denied, 84 S. Ct. 193 (1963); *Exchange Nat'l Bank v. I.N.A.*, 341 F.2d 673 (2d Cir. 1965—N.Y. law) (fictitious invoices with genuine signatures), cert. denied, 86 S. Ct. 37 (1965); and *First Nat'l Bank & Trust Co. v. U.S.F. & G.*, 347 F.2d 945 (10th Cir. 1965—Okla. law) (fictitious invoices with genuine assignment signatures).

Next, the 9th Circuit appeared to have embraced the minority view, *United Pac. Ins. Co. v. Idaho First Nat'l Bank*, 378 F.2d 62 (9th Cir. 1967—Idaho law), although the fact situation involved there is readily distinguishable from the facts at hand.[25] Since then two

[25] In *United Pac. Ins. Co. v. Idaho First Nat'l Bank*, the insured bank's loss resulted from depositing a purported "cashier's check," which in fact was only a "counter check" made to appear as a "cashier's check" and was signed with the name of a person who had never been an officer or employee of the indicated issuing bank.

more Courts of Appeals (5th[26] and 7th) have aligned themselves with the majority rule. *Capitol Bank v. Fid. and Cas. Co.*, 414 F.2d 986 (7th Cir., July 28, 1969—Illinois law) (fictitious invoices with genuine signatures).

We submit that the sounder rule is represented by the majority view adopted by seven of the nine circuits passing on this point and by numerous state courts.[27] Applying the majority rule here, Bank's loss is *not* covered under Clause (E), because the security documents in question, however fraudulent and worthless they may have been when pledged, were *not* "counterfeited." They were genuine, not counterfeited, as to the signatures of issuer San Marcos Compress; they were genuine, not imitation, warehouse receipts of issuer San Marcos Compress; indeed, they were in all respects bona fide when issued, although fraudulently worthless when pledged. Accordingly, the 5th Circuit soundly rejected Bank's "counterfeited" theory.

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[26]This case.

[27]Non-federal majority cases include: *U.S.F. & G. v. First Nat'l Bank*, 364 P.2d 202 (Col. 1961) (fictitious invoices with genuine signatures); *First Am. State Bank v. Aetna Cas. & Sur. Co.*, 130 N.W.2d 824 (Wis. 1964) (unsigned fictitious invoices with genuine assignment signatures); *Union Banking Co. v. U.S.F. & G.*, 213 N.E.2d 191 (Ohio Ct. App. 1965) (duplicate car titles with genuine signatures); *State Bank v. Hanover Ins. Co.*, 267 N.Y.S.2d 672 (Erie Co. 1965) (fictitious invoices with genuine signatures), aff'd 269 N.Y.S.2d 388 (App. Div. 1966). The only non-federal minority case cited by Bank (Appellee's Brief, pp. 30-37) is *Prudential Capital Corp. v. Royal Ind. Co.*, 249 N.Y.S.2d 728 (App. Div. 1964) (fictitious invoices). We doubt that this case is still law in New York, since two courts subsequently applying New York law have expressly declined to follow it, *Exchange Nat'l Bank v. I.N.A.*, 341 F.2d 673, 675-676 (2d Cir. 1965) and *State Bank v. Hanover Ins. Co.*, supra, preferring instead to apply the majority rule.

Furthermore, we submit that no "special and important" reasons, within the meaning of Supreme Court Rule 19, have been advanced by Bank as to why this court should now resolve the majority v. minority view hereinabove discussed.[9] Indeed, the fact that this court has thrice denied petitions for writs of certiorari in majority cases evidences the lack of such "special and important" reasons in this type of suit. There is no more "special and important" reason here than in those cases to grant certiorari. The form of bankers blanket bond sued upon here and in the majority-minority cases discussed hereinabove was adopted by the American Bankers Association in 1951, and the majority v. minority construction of "counterfeited" that Bank urges this court to resolve has existed since 1961, without disrupting either the banking or insurance industries involved.

Furthermore, with respect to Bank's contention[10] that "counterfeited" is necessarily ambiguous as used in Clause (E), by virtue of the majority v. minority interpretation thereof, calling for construction under Texas law liberally in favor of the insured and strictly against the insurer, comparable contentions have been expressly rejected in a number of majority cases. *First Nat'l Bank v. Glens Falls Ins. Co.*, 304 F.2d 866, 869 (4th Cir. 1962); *U.S.F. & G. v. First Nat'l Bank*, 364

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[9] *First Nat'l Bank v. Aetna Cas. & Sur. Co.*, 309 F.2d 702 (6th Cir. 1962), cert. denied, 83 S.Ct. 951 (1963); *North Carolina Nat'l Bank v. U. S. Cas. Co.*, 317 F.2d 304 (4th Cir. 1963), cert. denied, 84 S.Ct. 193 (1963); *Exchange Nat'l Bank v. I.N.A.*, 341 F.2d 673 (2d Cir. 1965) cert. denied, 86 S.Ct. 37 (1965). Reference is here made for all pertinent purposes to the respective replies to petitions for writs of certiorari in those cases.

[10] Bank's petition, pp. 15-16.

P.2d 202, 204-205 (Col. 1961); *State Bank v. Hanover Ins. Co.*, 267 N.Y.S.2d 672, 673-675 (Erie Co. 1965), aff'd 269 N.Y.S.2d 388 (App. Div. 1966); accord: *State Bank v. Maryland Cas. Co.*, 289 F.2d 544, 546-549 (8th Cir. 1961). Moreover, we submit that this particular point is, for purposes of Supreme Court Rule 19, academic and episodic, affecting the particular litigants here involved.

4. BANK REASON NO. 4 (THAT 5TH CIRCUIT HELD THAT WAREHOUSE RECEIPTS WERE NOT "STOLEN" AND THAT SUCH HOLDING CONFLICTS WITH TEXAS LAW IS NEITHER CORRECT NOR "SPECIAL AND IMPORTANT" WITHIN MEANING OF SUPREME COURT RULE 19.

As its last reason for granting certiorari, Bank advances the theory that all, or alternatively some, of the warehouse receipts in question were "stolen" within the meaning of Clause (E).[30] This theory is fallacious.

The principal fallacy in Bank's "stolen" theory is that it is a non sequitur. The premises upon which it rests are, in substance, (a) that failure to cancel the warehouse receipts was a civil statutory violation,[31] (b) that pledging them to Bank was an "issuance" thereof constituting a criminal statutory violation,[32] and (c) that "stolen," as used in Clause (E), should be broadly construed to include non-criminal situations.[33] From these premises Bank jumps a logical gap.

[30] Bank's petition, pp. 16-18.

[31] Texas Uniform Commercial Code, §7-403(3). Bank's petition, pp. 3-4.

[32] Article 1018, Texas Penal Code. Bank's petition, p. 3.

[33] Appellee's Brief, pp. 37-41; Bank's petition, pp. 16-18.

not bridged by either reasoning or authority, to the conclusion that the warehouse receipts were "stolen" within the meaning of Clause (E).[34]

Regardless of whether "stolen" is construed broadly (see the inapplicable non-bond cases cited by Bank)[35] or is given its usual and ordinary meaning (see *Laird v. Employers Liab. Assur. Corp.*, 18 A.2d 861, 863-864 (Del. 1941))[36] to fail to cancel the warehouse receipts as required by civil statute does not transform them into "stolen" ones. Neither does "issuance" of them in violation of a criminal statute.[37] It is how and why fraudulent and unlawful warehouse receipts become "stolen" by reason thereof that is Bank's non sequitur.

The purpose and meaning of "stolen," as used in Clause (E), is readily discernible. If the warehouse receipts pledged to Bank had been stolen by Behring from X, and if X had subsequently dispossessed Bank of them under X's superior ownership rights, then to the extent of their value Bank would have sustained a loss through having extended credit on the faith of documents which proved to have been "stolen" within the meaning of Clause (E). Neither that nor any ana-

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[34] *Ibid.*

[35] Bank's petition, pp. 16-18; Appellee's Brief, pp. 39-41.

[36] Holding that a stock certificate bought with a worthless check was not "stolen" within the meaning of comparable bond language.

[37] Without authority or reasoning Bank erroneously asserted in the 5th Circuit and appears to assert here that Behring's pledge of the warehouse receipts on October 10, 1966, was an "issuance" thereof within the meaning of Article 1018, Texas Penal Code. Appellee's Brief, pp. 38-39; Bank's petition, p. 15. We submit that the warehouse receipts were "issued" only once by the San Marcos Compress, that being at the respective dates shown thereon. See Stip. 25, App. 62-63.

logous situation exists in this case. No one claiming to be the owner of warehouse receipts "stolen" by Behring has repossessed, or even attempted to repossess, any of the warehouse receipts from Bank.

Moreover, assuming arguendo that the warehouse receipts could be characterized as "stolen" documents when pledged to Bank, their *stolenness* has not caused, and cannot cause, any pecuniary loss to Bank. This is true because the warehouse receipts were wholly worthless at the time they were pledged to Bank.[1] The bales represented thereby had already been sold and shipped by the Behring partnership without cancellation of the warehouse receipts.[2] Consequently, where, as here, the vice is in their worthlessness, not their stolenness, when pledged to Bank, and where, as here, no one has made any effort to dispossess Bank of any of them as "stolen" property, Bank has *not* sustained any pecuniary loss through having extended credit on the faith of documents which prove to have been "stolen" within the meaning of Clause (E)."

Accordingly, both because the warehouse receipts were not "stolen" within the meaning of Clause (E) and because their stolenness, if any, has not caused any pecuniary loss to Bank, Maryland is not liable under Clause (E) to Bank upon its "stolen" warehouse receipt theory. Finally, we submit that error, if any, by the 5th Circuit on this point certainly could not satisfy the "special and important" reasons criteria of this court's Rule 19.

[1] Stip. 25, App. 62-63.

[2] *Ibid.*

[3] That causation of pecuniary loss is a necessary element of a bond claimant's cause of action, see such cases as *Am. Emp. Ins. Co. v. Roundup Coal Mining Co.*, 73 F.2d 592, 595 (8th Cir. 1934).

CONCLUSION

For the reasons and under the authorities discussed hereinabove and in Maryland's briefs in the Court of Appeals[1] we submit that the 5th Circuit has correctly decided this case. Moreover, as reflected hereinabove, in this case there are no "special and important" reasons, within the meaning of Supreme Court Rule 19, to warrant this court granting certiorari. There is admittedly no federal or constitutional question involved here. This court has three times declined to grant certiorari to resolve the majority-minority view of the Courts of Appeals as to the meaning of "counterfeited" in Clause (E) of the bond sued upon here. There is no conflict, as Maryland sees it, between the 5th Circuit's opinion and holdings in this case and any Texas case or statute cited by Bank or of which we are aware; alternatively, any such conflict would be, for purposes of Supreme Court Rule 19, an academic and episodic matter, affecting the litigants here involved.

Wherefore, premises considered, respondent Maryland prays that petitioner Bank's petition for writ of certiorari be in all things denied.

Respectfully submitted,

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[1] Appellant's Brief; Appellant's Reply Brief.

CERTIFICATE OF SERVICE
UNDER SUPREME COURT RULE 33(3)(b)

On this day of , 1970, I hereby certify that three copies of this respondent's brief opposing petition for writ of certiorari were mailed, certified first class mail, postage prepaid, to (a) James P. Hart, Hart, Keahey & Hart, Attorneys at Law, 904 Brown Building, Austin, Texas 78701, (b) Tom C. Oliver, Jr., First Federal Savings and Loan Association Building, San Marcos, Texas 78666, and (c) Ernest Morgan, P. O. Box 1288, San Marcos, Texas 78666, counsel for petitioner State Bank & Trust Company. I further certify that all parties required to be served have been served.

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APPENDIX A

Stipulated Facts

The following facts, among others, were stipulated verbatim by Maryland and the Bank:

"At all times material herein Behring & Behring, a Texas partnership composed of Arthur H. Behring and Melvin A. Behring, owned and operated the San Marcos Compress, a licensed and bonded warehouse located in San Marcos, Hays County, Texas. . . ."[5] "*On October 19, 1966, Bank loaned $50,000.00 to Behring & Behring*, evidenced by a promissory note signed by A. H. Behring on behalf of said partnership. . . ."[6] "Said promissory note was secured by a security agreement-pledge signed by A. H. Behring on behalf of Behring & Behring; which . . . provided that said partnership pledged 700 bales of cotton evidenced by negotiable warehouse receipts in bearer form, issued by San Marcos Compress, to secure the payment of said sum of $50,000.00. . . ."[7] "A. H. Behring then delivered to Bank 700 warehouse receipts issued by San Marcos Compress. . . ."[8] "At the time of the delivery of said promissory note, security agreement-pledge, warehouse receipts . . . Bank in good faith and in the course of business, at its banking house in San Marcos, Texas, delivered to A. H. Behring, who was acting on behalf of Behring & Behring, its cashier's check pay-

[5]Stip. 6, App. 45. (Footnote numbering 1-7 omitted.)

[6]Stip. 7, App. 45. For a copy of the promissory note, see Plaintiff's Exs. D-1, 2, App. 45, 92-93.

[7]Stip. 7, App. 45-46. For a copy of the security agreement, see Plaintiff's Exs. E-1/5, App. 46, 94-98.

[8]Stip. 7, App. 46. For copies of the warehouse receipts, see Defendant's Exs. B-1/700 to Thornton deposition.

able to Behring & Behring, for the sum of $50,000.00, *which said cashier's check . . . constituted the proceeds of the $50,000.00 loan.*[6] "Said cashier's check was deposited in the checking account of Behring & Behring . . . and . . . was paid by [Bank] in due course on October 13, 1966."[7]

"A *few days before Bank made the said loan to Behring & Behring on October 10, 1966,* Melvin A. Behring told J. R. Thornton, president of Bank, that Behring & Behring would give Bank *as security for the loan of $50,000.00* 700 bales. . . ."[8] "By the express statement of Melvin A. Behring before October 10, 1966, and by the actions of A. H. Behring in delivering and pledging to Bank the said 700 warehouse receipts . . . and in executing the security agreement [pledge] *in connection with the loan of $50,000.00 by Bank to Behring & Behring,* the said Melvin A. Behring and A. H. Behring represented to Bank that Behring & Behring owned the 700 bales of cotton that were purportedly covered by said warehouse receipts and that said bales of cotton were then in the San Marcos Compress . . . ."[9] "Said representations . . . were false."[10] "*In making the loan of $50,000.00* . . . Bank did not rely upon the financial statements furnished to Bank by Behring & Behring, but relied upon the collateral [700 warehouse receipts]." "Bank would not

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[6] Stip. 7, App. 47. For a copy of the cashier's check, see, Plaintiff's Exs. P-1, 2, App. 47, 99-100.

[7] Stip. 7, App. 47.

[8] Stip. 8, App. 47.

[9] Stip. 9, App. 47-48. See also Stip. 18, App. 52.

[10] Stip. 9, App. 48. Said representations were false except as to 4 bales. Stip. 9, 20-21, App. 48, 53, 61.

have delivered or paid at its said cashier's check if it had known or had any reason to believe that said representations were not true."[17]

"When each of said 700 warehouse receipts was originally issued, there was then in the San Marcos Compress a bale of cotton identified by the same number as the number of the warehouse receipt. . . ."[18] "The signature itself of the San Marcos Compress, as issuer, upon each of the 700 warehouse receipts is genuine and is not counterfeited or forged."[19] "At the respective times of original issuance of the 700 warehouse receipts on the dates which they bear respectively, each of them was a bona fide, valid and negotiable warehouse receipt of value."[20]

"At the time the Behring partnership received the said $50,000.00 . . . Melvin A. Behring knew that all or almost all of said 700 bales of cotton had been shipped prior to the time *the said $50,000.00 loan was negotiated.*"[21] "At that time Melvin A. Behring knew that the warehouse receipts for such shipped bales of cotton should have been cancelled, but he directed Behring's partnership employees that they not be cancelled."[22]

"On or about October 31, 1966, Bank first received information which caused Bank to inquire whether the 700 bales of cotton which purportedly were represented

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[17]Stip. 12, App. 49.
[18]Stip. 18, App. 52.
[19]Stip. 14, App. 50.
[20]Stip. 15(e), App. 51.
[21]Stip. 15(f), App. 51.
[22]Stip. 10, App. 48. See also Stips. 20, 22, App. 53, 59-60.
[23]Stip. 10, App. 48.

by said warehouse receipts were in the San Marcos Compress. . . . Within a few days thereafter, . . . Bank was informed by [San Marcos Compress] employees that all except possibly 2 [later determined to be 4] of said bales of cotton had been shipped out of said warehouse. . . ."[24]

"On November 8, 1966, by its letter Bank demanded of Behring & Behring that said note for $50,000.00, dated October 10, 1966, be paid. A day or two before said written demand was made, an oral demand had been made by Bank upon Melvin A. Behring for the payment of said note. Said note was not paid by Behring & Behring, and all of said note and all sums due to be paid thereunder were wholly unpaid when Behring & Behring and the individual members of said partnership were adjudicated to be bankrupt."[25]

In summary:

"*The Behring partnership borrowed $50,000.00 from State Bank & Trust Company* upon a genuinely signed promissory note, a genuinely signed security agreement-pledge, and genuinely signed 700 warehouse receipts; all of which warehouse receipts were genuine, bona fide, valid and valuable at the time each of them was originally issued upon the date appearing thereon, but 696 of such warehouse receipts were not genuine, bona fide, valid, or valuable at the time they were pledged to Bank on October 10, 1966, in that the 696 bales of cotton represented thereby had been previously shipped out by the San Marcos Compress without Arthur H. Behring, Melvin A. Behring, anyone acting

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[24] Stip. 22, App. 59.

[25] Stip. 26, App. 63.

on behalf of the Behring partnership, or any other person having cancelled any of such 696 warehouse receipts.'"[27]

"*The $50,000.00 loan by Bank to the Behring partnership was procured through false pretenses on the part of Melvin A. Behring.*"[28]

"*On November 8, 1966, Bank sustained a loss of $50,000.00, plus 7% interest from October 10, 1966, to that date, as the result of the complete nonpayment and default of Behring & Behring and the members of said partnership upon the $50,000.00 loan made by and obtained from Bank on October 10, 1966.* If the Behring partnership had paid the $50,000.00 note as demanded on November 8, 1966, Bank would have sustained no loss. If the 706 bales of cotton had then been in the San Marcos Compress warehouse and if Bank had pursued its remedies and had sold those bales for enough to cover the $50,000.00 and accrued interest, the Bank would have sustained no loss.'"[29]

In the fourth count of an indictment Behring was charged with theft of the $50,000.00 from the Bank's president.[30] That count includes theft by false pretext, and Melvin Behring pleaded guilty to theft by false pretext.[31]

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[27] Stip. 25, App. 62-63.

[28] Stip. 28, App. 64.

[29] Stip. 27, App. 63.

[30] Stip. 29, App. 64-65; Stipulations, App. 117; Defendant's Ex. A, App. 123.

[31] Stip. 29, App. 64-65; Stiplations, App. 118; Defendant's Ex. B, App. 124.

APPENDIX B

Extract from 5th Circuit's Opinion

"Melvin Behring was charged with theft of the $30,000 from the Bank's president. He pleaded guilty to theft by false pretenses and was adjudged guilty of that offense by the District Court of Hays County, Texas.

* * *

"The Bank relies upon Clause B of the bond which provides, in pertinent part, that Maryland agrees to indemnify the Bank against:

> "Any loss of property through . . . theft. . . .

"Maryland, on the other hand, relies upon a loan exclusion clause in the bond which excludes from coverage:

> "(d) Any loss the result of the complete . . . non-payment of or default upon any loan made by or obtained from the Insured, whether procured in good faith or through . . . fraud or false pretenses, except when covered by Insuring Clause . . . or (E).

"The crux of this appeal is the correct interpretation of these clauses and Insuring Clause (E) which we discuss infra.

"The District Court concluded that 'the transaction cannot be called a loan within the language of the exclusion clause' because 'Behring knew . . . not only that the warehouse receipts were valueless but also that he never intended to repay the money. He wanted to steal the money, not to obtain a loan, and he simply used the mechanics of the loan procedure to effect the theft. With Behring having such an intent, the transaction cannot be called a loan within the language of the exclusion clause. There being no loan, there is no exclusion.' The

Court then held that since the loss was the result of theft it was covered under Clause B of the bond.

"For the reasons that we will delineate, we are convinced that the District Court's interpretation of the loan exclusion clause is erroneous. . . . And we have, after considerable search, turned up nothing that has the slightest persuasiveness that the exclusionary clause of the bond can be nullified by the subjective fraudulent intent of the borrower, notwithstanding that the objective indicia all point one way—that a loan was made by the Bank to the partnership.

> "The district court's finding on this ultimate issue, * * * is not to be garrisoned by the clearly erroneous rule. Though it has factual underpinnings this ultimate issue is inherently a question of law. Obeisance to the clearly erroneous rule must yield when the facts are undisputed and we are called upon to reason and interpret. This is the law obligation of the court as distinguished from its fact finding duties. United States v. Winthrop, 5 Cir. 1969, 417 F.2d 905, 910.

"In Community Federal Savings & Loan Association v. General Casualty Co., 8 Cir. 1960, 274 F.2d 620, which we recently cited with approval in East Gadsden Bank v. United States Fidelity and Guaranty Co., 5 Cir. 1969, 415 F.2d 357. . . .

> "Plaintiff insists that its loss is not the result of a complete or partial nonpayment of or default in any loan made or obtained by it. Plaintiff argues that if the statements as to the completion of the buildings and the payment of lien claims had been true, no loss would have been suffered; hence, the fraud was the cause of the loss. The same type of claim could doubtless be made in almost any

type of loan induced by fraud. It is undisputed that loans were made which remain unpaid in part. While the loan was induced by fraud, it seems clear that the immediate cause of the loss was the nonpayment of the loans. It is entirely clear from the exclusion provision as written that the exclusion extends to losses on loans induced by fraud.

"Id. at 624, 625.

"We are unpersuaded by State Bank's argument that Community Federal can be distinguished because fraud was there involved, while here there was a theft. *As we pointed out earlier, we are not bound by the conclusionary characterization of 'theft' based upon the borrower's subjective intent that the District Court ascribed to the transaction.* We perceive no basic difference in the case sub judice and Community Federal. In this case the promissory note was accepted by the Bank as the legal liability of the partnership. Upon that evidence of indebtedness, secured by the warehouse receipts, the Bank made its loan. It is uncontradicted 'that the basic transaction was a loan,' that it remained unpaid, and that the default was the 'immediate cause' of the loss. East Gadsden, supra, at 360. The transaction thus fell squarely within the terms of the loan exclusion clause. See, First National Bank of Memphis v. Aetna Casualty & Surety Co., 6 Cir. 1962, 309 F.2d 702, cert. denied 83 S.Ct. 951 (1963).

"The Bank next presses its argument that the clause in question is ambiguous and should be construed against the insurer because 'a distinction is intended between a loan procured through a crime, such as theft, and a loan which, though

[1]First place that Bank misconstrues as a holding that Melvin Behring did not commit a theft.

wrongfully procured, was obtained under such circumstances as to create only a civil liability and not a criminal liability.' We are unable to accept this periphrastic proposition. The District Court did not rest its decision on the premise here urged by the Bank. . . . The distinction of criminal vis-a-vis civil liability sought to be drawn by the Bank as the benchmark of coverage vel non has support in neither the language of the loan exclusion clause nor in precedent.

"In Texas whether an ambiguity exists in the language of an exclusionary clause is one of law. If the language 'is clear and unambiguous, such meaning must be given to the language as will carry out and effectuate the intention of the parties. In that event, rules of construction, such as adopting that construction most favorable to the insured, are not to be applied.' St. Paul Mercury Insurance Company v. Price, 5 Cir. 1966, 359 F.2d 74, 76. We find the language here under consideration to be 'clear and unambiguous.' East Gadsden, supra; Community Federal, supra; Depositors Trust Co. v. Maryland Casualty Co., Me. 1961, 174 A.2d 288. *It appears plain to us that a person subjectively intending to use an objectively bona fide loan transaction as a means of getting money from a bank with no intention of repayment does not procure a loan through theft.*" (5th Cir. opinion, pp. 3-8)

Second place that Bank misconstrues as a holding that Melvin Behring did not commit a theft.